In the District Court of the United States for the Western District of North Carolina, Asheville Division

Civil No. 507

CAROLINA SCENIC COACH LINES, A COPARTNERSHIP, PLAINTIFF-APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to rule 12, paragraph 3, of the Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree,[1] dated July 21, 1944, of a specially constituted District Court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing plaintiff's complaint to set aside an order of the Interstate Commerce Commission. The Commission's order, dated October 13, 1943,

[1] The Court also made findings of fact and conclusions of law and rendered an opinion.

619115—44

under Section 207 of Part II of the Interstate Commerce Act (49 U. S. C. 307) granted the application of Smoky Mountain Stages, Inc.[2] (hereinafter referred to as Stages), a corporation with its principal office at Asheville, North Carolina, for a certificate of public convenience and necessity extending its authority as a common carrier of passengers by motor bus so as to authorize it to operate over a prescribed route between Clinton, South Carolina, and Augusta, Georgia, and to serve certain intermediate points. By the same order, the application of plaintiff, Carolina Scenic Coach Lines, hereinafter referred to as Scenic, for a certificate authorizing operation over the same route was denied.[3] An appeal was allowed on September 27, 1944.[4] Notwithstanding the provi-

[2] This company intervened as a defendant in the District Court.

[3] Scenic's general manager testified before the Commission that Scenic's application was simply filed for protection; and that Scenic did not believe that service over the proposed route was necessary, but wished to furnish such service rather than to permit Stages to do so if the Commission were of the view that service should be provided (Tr. 428, 430). It is evident from the complaint and the assignment of errors that plaintiff attacks only the granting of operating rights to Stages, and not the denial of such rights to plaintiff.

[4] Under 28 U. S. C. 47a an appeal in a case of this character must be taken within 60 days after the entry of final judgment or decree. Since the Court's decree here was entered on July 21, 1944, the appeal was not allowed within the 60-day period. However, the petition for appeal is stamped by the clerk of the District Court as having been filed on September 1, 1944, which date would be within the 60-day period.

sions of Rule 12, paragraph 2, of the Supreme Court Rules requiring service of certain appeal papers upon appellees within five days after the allowance of an appeal, such papers in the present case were not received by appellees until October 16, 1944, in a letter from the clerk of the District Court.

These two applications were referred by the Commission for hearing under Section 205 (a) of the Interstate Commerce Act (49 U. S. C. 305 (a))[1] to a Joint Board of two members, one from each of the States of South Carolina and Georgia, the States through which the proposed route ran. The Joint Board, after hearing, issued a report recommending that the application of Stages be granted and that of Scenic be denied. Thereafter the case was considered by Division 5 of the Commission, which wrote its own report, reaching the

[1] That Section, so far as pertinent, provides:

"The Commission shall, when operations of motor carriers * * * conducted or proposed to be conducted involve not more than three States, and the Commission may, in its discretion, when operations of motor carriers * * * conducted or proposed to be conducted involve more than three States, refer to a Joint Board for appropriate proceedings thereon any of the following matters arising in the administration of this part with respect to such operations as to which a hearing is required or in the judgment of the Commission is desirable: Applications for certificates, * * *. The Joint Board to which any such matter is referred shall be composed solely or one member from each State within which the motor-carrier * * * operations involved in such matter or are proposed to be conducted: * * *."

ultimate conclusion that public convenience and necessity required institution of the above-mentioned operations by Stages, but did not require the operations proposed by Scenic. Subsequently plantiff's petition for reconsideration was denied by the entire Commission.

The basis for the Commission's ultimate conclusion is apparent from the subordinate findings quoted in the Court's opinion. From these it appears that Stages is a member of National Trailways System. If the granting of Stages' application is approved, the last link in a chain of through motor-bus routes of Trailways' members between northern points and Florida will be completed. At present persons desiring to travel by bus between such points are virtually dependent upon Greyhound lines. Traffic originated by Trailways' members for Florida is now transferred at Charlotte, North Carolina, to the Atlantic Greyhound Corporation * (hereinafter called Greyhound), which completes the transportation south through the Jacksonville gateway. The routes of Trailways' members run through west coast Florida points, and with this link added, they will provide a more direct service to and from such points than that rendered by Greyhound through Jacksonville. There is need for another through north-south service, and any detriment which Greyhound might suffer by rea-

* Greyhound originally opposed the application of Stages but took no part in the District Court proceedings.

son of the establishment of another system of through routes is outweighed by the benefit to the public.

The Commission then proceeded to consider whether this need could be accomplished as well by Scenic and Carolina Stages, another bus line, over a through route presently maintained by them between Charlotte, North Carolina, and Augusta, Georgia, via Union, Newberry, and Saluda, South Carolina. In concluding that the best interests of the public would be served by granting Stages' application it pointed out that not until two weeks prior to the hearing herein had convenient connections and a more expeditious service been instituted over this through route between Charlotte and Augusta. It pointed out, too, that in the past the inability of Scenic and Carolina Stages and the National Trailways System to reach a satisfactory agreement as to the placing of these two carriers' routes in the Trailways' system appears to have been the delaying factor in the establishment of a through route between Charlotte and Augusta, and the cause of the filing of Stages' application. It further stated that the maintenance of a coordinated system of independent carriers, such as Trailways, required cooperation and friendly relations between the various members and that it was not indicated that future relations between Trailways, Scenic, and Carolina Stages would be more harmonious.

As to the competitive effect of this new through service, the Commission stated that while the granting of the application would bring Stages into a competitive situation with Scenic and Carolina Stages between Charlotte and Augusta, there was no showing that any substantial traffic was moving over the combined routes of Scenic and Carolina Stages between these points, and that it was apparent that relatively little, if any, Florida traffic was handled over such routes. It stated, too, that the new operations would bring Stages into competition with Scenic between Clinton, South Carolina, and Augusta, Georgia, the latter company operating between those points over a slightly different route from that sought by Stages. But it pointed out that there was no evidence as to the amount, if any, of through "bridge" traffic[7] which Scenic transported over this route or the number of passengers moving between points on this route and points beyond.

Finally, the Commission dealt with the need for and the effect of permitting local operations by Stages between Clinton, South Carolina, and Augusta, Georgia, and intermediate points on the proposed route, although pointing out that Stages anticipated most of its traffic over the route would be through "bridge" traffic. It found that while Scenic had long served most of the points on the

[7] "Bridge" traffic is traffic moving over this route having an origin above or below, and a destination beyond, the termini of this route.

proposed route, the latter route traversed 63.5 miles of highways not served by Scenic. It found, too, that persons located on a large portion of such highways had no direct service to or from Clinton, Charlotte, or Augusta; and that on 40.7 miles there was no bus service available. Also it stated that although Stages would, if this application were granted, compete with Scenic for the local traffic on this route, nevertheless, Scenic's interstate traffic between points on its route provided but a small portion of its revenue. It concluded that while a portion of such traffic might be diverted to Stages if the latter's applications were granted, any loss of traffic to Scenic would not be a sufficient reason for denying the application of Stages when consideration was given to the benefit to the public in having the through routes between New York City and Florida points and points intermediate thereto.

Plaintiff, as indicated in its jurisdictional statement, attacks the Commission's action principally on the following grounds: (1) that the Commission unlawfully referred the case for hearing to a Joint Board which was not properly constituted; (2) that the Commission erred in failing to find that there was no need for local service over the proposed route in addition to that now supplied by plaintiff or others; (3) that the Commission improperly found that public convenience and necessity required operation over the proposed route as a "bridge" route between the North At-

lantic States and Florida; (4) that the Commission failed to take proper cognizance of the adverse effect of the proposed new route on the existing operations of plaintiff; and (5) that the Commission failed to consider the physical condition of the proposed new route, particularly in relation to its contemplated use as a part of a regular north-south highway. It is submitted that these contentions present no substantial question and that the decree of the District Court should therefore be affirmed without argument.

(1) Plaintiff attacks the reference of the case to a Joint Board composed of representatives of only South Carolina and Georgia, and urges that because Stages would draw passengers from many other States on this route, the Commission should have included representatives from these States on the Board or else heard the matter itself in the first instance. Section 205 (a) requires the Commission to refer an application for a certificate to a Joint Board when the "operations proposed to be conducted involve not more than three States," and authorizes it in its discretion to do so when such proposed operations involve more than three States. It further provides that the Joint Board "shall be composed solely of one member from each State within which the motor-carrier * * * operations involved * * * are or are proposed to be conducted." See footnote 5, *supra*. The language of this Section

plainly has reference to the States over whose highways[*] the operations proposed in the application would be physically conducted, here Georgia and South Carolina, and not to the States from which the traffic might perhaps be derived. Consequently, since operations in only these two States were involved, reference to a Joint Board of their representatives was mandatory. Furthermore, the States from which the traffic would originate would not generally be indicated in the application but could only be ascertained, even then only conjecturally, from the evidence subsequently introduced, and it has been recently recognized that the need for a Joint Board must be ascertained from the conditions indicated in the application rather than in the evidence. *North Coast Transportation Co.* v. *United States*, 54 F. Supp. 448, 450 (N. D. Cal.), affirmed, *per curiam*, No. 275 this Term, October 9, 1944. Moreover, as the District Court concluded, even if the reference to the Joint Board was improper, the appellant "not having made objection either before the Board or before the Commission, cannot now object to the

[*] The certificate provisions of the Act are obviously concerned with particular physical highway operations proposed in an application. Thus, Section 206 (a) (49 U. S. C. 306 (a)) forbids a common carrier by motor vehicle to "engage in any interstate or foreign operation on any public highway unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations * * *."

reference" to the Joint Board.* In any event, as the District Court further pointed out, even if objection had been made and sustained, the result would have been merely to give the Commission discretion whether to refer the matter to a larger Joint Board for hearing or to hear it itself; and since the Commission heard the matter at large and filed an opinion giving its independent judgment, it is not possible to see how plaintiff was hurt by the hearing before the Board.

(2) As appears from the evidentiary findings made in the Commission's report, the Commission was perfectly justified in refusing to accept plaintiff's contention that there was no need for local passenger service over the proposed route in addition to that now supplied by plaintiff and others. Thus, the Commission found that while plaintiff had been operating between Clinton, South Carolina, and Augusta, Georgia, for a long period of time, serving most of the cities and towns on the proposed route, the latter route traverses 63.5 miles of highway not served by plaintiff. It

* Rule 87 of the Commission's Rules of Practice expressly provides that: "An objection not pressed in brief will be considered as waived"; and the point regarding reference to a Joint Board was not mentioned in plaintiff's brief or exceptions before the Commission. The District Court, in its finding of fact No. 4, found that "neither at the hearing before the Joint Board nor at the hearing before the Commission, did Carolina Scenic Coach Lines raise any objection to the reference to the Joint Board nor to the manner in which it had been constituted." See *Chicago, St. P., M. & O. Ry.* v. *United States*, 322 U. S. 1, 3–4.

found, too, that persons located on a large portion of such highways have no direct service to or from Clinton, Charlotte, or Augusta, and that on 40.7 miles there is no bus service available.

(3) The Commission's conclusion that public convenience and necessity required operations over the proposed route as a "bridge" route between northern points and Florida was likewise clearly justified. It found that the granting of the present application would forge the last link in a chain of National Trailways System through routes from the north to Florida, and thus enable Trailways members to provide competition for such through traffic with Greyhound, now a virtual monopolist in the territory involved here. It is well settled that the Commission may permit new service for the very purpose of giving the public the benefits of competition, as it did here. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 41–43; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 219 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944.

Furthermore, the Commission referred to the lack of harmony between plaintiff, Carolina Stages, and Trailways, which clearly indicated that the need for through Trailways service could better be met over Stages' route than by way of plaintiff's routes.

(4) Contrary to plaintiff's contention, it is also evident that the Commission did take due cognizance of the competitive effect of the proposed operations upon plaintiff's existing operations. As indicated above, the Commission carefully considered this question both with respect to plaintiff's through operations in concert with Carolina Stages between Charlotte, North Carolina, and Augusta, Georgia, and as to plaintiff's through and local operations between Clinton, South Carolina, and Augusta. It found that there was no showing that any substantial through traffic moved over either of these routes of plaintiff. As to the local traffic over the latter route, it found that plaintiff's interstate traffic moving to or from points on such route provided but a small part of its revenue, and that, while a portion of such traffic might be diverted to Stages if its application were granted, this factor was outweighed by the resulting public benefit."

(5) There is no indication that the Commission did not take into consideration the physical condition of Stages' proposed route, or that its condition was such as to justify denial of the application to operate over it. Plaintiff in its brief

[10] In *McLean Trucking Co.* v. *United States*, 321 U. S. 67, 86, the Court said that "The Motor Carrier Act is to be administered with an eye to affirmatively improving transportation facilities, not merely to preserving existing arrangements or competitive practices."

before the Commission pointed out that part of the route was over a four-mile stretch of rough clay road through a rural section, and that certain other parts of the highway were narrow, winding, and rough, having numerous railroad crossings and a one-way bridge. Presumably the Commission took into consideration these factors and concluded that they would not present an insurmountable obstacle to the service, as indicated by its basic finding that "applicant is fit, willing, and able properly to perform such service." While the report contains no discussion concerning the condition of the road, findings on that point were not of the basic or "quasi-jurisdictional" type, which are essential to the validity of Commission action. *United States* v. *Baltimore & Ohio R. R. Co.*, 293 U. S. 454, 464–465. There is nothing in the record to show that this road was generally impassable. Plaintiff did not so consider it, since it sought permission from the Commission to operate over the route. Although apparently a small portion of the route was not over a good road, that portion was in a rural area, where, because of light traffic, the defects of the road were not likely to impair seriously Stages' proposed service. To compensate for the condition of the road it appears, too, as plaintiff's president admitted before the Commission (Tr. 440),

that the proposed route of Stages was two miles shorter than plaintiff's existing route between Clinton, South Carolina, and Augusta, Georgia.

The District Court properly held that the question of public convenience and necessity is one of those ultimate questions of fact entrusted to the expert judgment of the Commission, whose determination with respect thereto will not be disturbed if based upon a rational basis and substantial evidence. *Chesapeake and Ohio Railway Company* v. *United States,* 283 U. S. 35, 42; *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 143–146; *Saginaw Broadcasting Co.* v. *Federal Communications Commission,* 96 F. (2d) 554, 559 (App. D. C.), certiorari denied, 305 U. S. 613; *Davidson Transfer & Storage Co.* v. *United States,* 42 F. Supp. 215, 218 (E. D. Pa.), affirmed, 317 U. S. 587; *North Coast Transportation Co.* v. *United States,* 54 F. Supp. 448 (N. D. Cal.), affirmed *per curiam,* No. 275 this Term, October 9, 1944; *Kansas City and Leavenworth Transportation Co.* v. *United States,* 51 F. Supp. 916, 921 (D. Del.). It likewise properly held, applying this test, that "there can be no question but that * * * the order of the Commission was amply supported."

For the foregoing reasons, it is evident that this appeal presents no substantial questions. It is therefore respectfully submitted that the decree of the District Court should be affirmed.

CHARLES FAHY,
Solicitor General.

DANIEL W. KNOWLTON,
Chief Counsel,
Interstate Commerce Commission.

OCTOBER 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944